

Subject: Follow-Up on Encroachment Enforcement Policy

Honorable Mayor and City Councilmembers:

As you know, I have dedicated a great deal of time toward protecting our deed restrictions and thereby preserving our Parklands for public recreational use over the last six years. It is not just the litigation over the parklands sale, but also includes walking all the paths, lanes, alleys and parklands with Ried Schott in 2013 and preparing an inventory of encroachments summarized in the attached presentation with photos, maps and diagrams; this inventory formed the basis for the City's current list of 200 encroachments.

I recognize that this is only one of many issues you must deal with as City Councilmembers, so please bear with me if I seem overzealous and perhaps even strident in this communication. But I can't help being passionate about solving this problem.

I am writing to you about last night's discussion of a new Encroachment Enforcement Policy. I have tried **at least five times** since last June to communicate my proposal for tackling this issue in a way that I am confident will fix the problem—**but it will succeed only if the whole proposal is adapted without significant modification or omission:**

- In June 2019 a draft to two of you individually (this was in the packet for last night's meeting and attached again here)
- In September 2019 in an email to the entire Parklands Committee since I was out of town on the first night they discussed this topic (this was also in the packet for last night's meeting)
- In a speech I made to the Parklands Committee when they discussed this at their 11/14/19 meeting (attached)
- In a speech I made to the Parklands Committee when they discussed this at their 1/9/20 meeting (attached)
- In my speech I shared with you last night at City Council (attached)

Unfortunately, very little of my proposal and ongoing comments have been incorporated into the current draft. **That makes me very sad, because I believe the path you are on will be frustratingly unsuccessful.** It makes me sad because **I want you to be successful in this**, and I truly believe that all of you (and all of the Parklands Committee members) want to have an effective policy that will **clear encroachments up permanently without having to resort to costly enforcement legal actions.** But without modification that brings the proposed Policy more closely in alignment with my proposal, I am absolutely convinced it will be a failure and lost opportunity.

Faced with this disconnect, I apologize for my ineffectiveness in clearly communicating my original proposal. *I must conclude that I have been ineffective in explaining why each of the elements are essential in order to create the motivation for residents to comply and remediate existing encroachments once identified (and adjudicated through the City processes).* So please permit me one last time to make it clear why I think these elements are all crucial:

- **Bigger starting fines**
- **No cap on the escalation in fines if not remediated**
- **All fines due upon the end of adjudication, not after some grace period like 1-year**
- **Liens applied 1-year after fines assessed in all cases (not as a "last resort")**
- **No grace period but 1-year amnesty from the date the new policy is enacted**

- Legal actions to force compliance should be unnecessary
- Severity factors affect the size of the initial fine

Let me take each of these elements in turn and explain the rationale and importance of each.

Bigger starting fines

I am glad to hear that the majority of the Council expressed an interest last night in bigger fines. This is critical because I believe fines recommended by staff which start at \$1000 or \$2500 and escalate over three years to a maximum of \$15,000 simply won't work to address and fix/prevent the significant encroachments that are corrupting our parklands and denying public access to the paths/lanes/alleys between the streets, and between the streets and our parkland. A lower fine may be sufficient to motivate action in terms of removing a 43 inch or higher bush or a small structural encroachment on street ROW. But it will assuredly be ineffective in addressing the more significant encroachments where the value to residents of retaining the encroachment in terms of their enjoyment and privacy while they own their home, and when the value of their property when they sell it far exceeds \$15,000.

No cap on the escalation in fines for parkland encroachments if not remediated

Councilmember Kemp was the only one of you who seemed to grasp the importance of no cap on fines. This is almost more important than the size of the initial fine. **The inevitability of doubling for each year of inaction will truly motivate compliance and removal.** Councilmember Davidson mentioned the egregious encroachments that Dr. Lugliani built on the parkland next to his property beginning in the late 1970s. Regardless of whether the fine starts at \$2500, \$7500 or \$10,000, it is only with a doubling each year that it reaches truly motivating levels after five years (if not sooner) and quickly becomes more than the value of most homes in ten years. Faced with the inevitable prospect of such escalating fines, I am sure that Dr. Lugliani would have taken action very soon after he was originally cited in the late 1970s, and certainly before this blew up in 2011 when he ignored the R05-32 citation issued in 2006. That inaction led to the notorious MOU and sale of parkland in 2012, and subsequent costly litigation to reverse the sale of parkland over the next five years. **All of that could have been avoided if this Policy proposal had been in place in 1978:**

Year since Citation	Year	Initial Fine \$2,500	Initial Fine \$5,000	Initial Fine \$10,000
0	1978	\$2,500	\$5,000	\$10,000
1	1979	\$5,000	\$10,000	\$20,000
2	1980	\$10,000	\$20,000	\$40,000
3	1981	\$20,000	\$40,000	\$80,000
4	1982	\$40,000	\$80,000	\$160,000
5	1983	\$80,000	\$160,000	\$320,000
6	1984	\$160,000	\$320,000	\$640,000
7	1985	\$320,000	\$640,000	\$1,280,000
8	1986	\$640,000	\$1,280,000	\$2,560,000
9	1987	\$1,280,000	\$2,560,000	\$5,120,000
10	1988	\$2,560,000	\$5,120,000	\$10,240,000
11	1989	\$5,120,000	\$10,240,000	\$20,480,000
12	1990	\$10,240,000	\$20,480,000	\$40,960,000
13	1991	\$20,480,000	\$40,960,000	\$81,920,000
14	1992	\$40,960,000	\$81,920,000	\$163,840,000
15	1993	\$81,920,000	\$163,840,000	\$327,680,000
16	1994	\$163,840,000	\$327,680,000	\$655,360,000
17	1995	\$327,680,000	\$655,360,000	\$1,310,720,000
18	1996	\$655,360,000	\$1,310,720,000	\$2,621,440,000
19	1997	\$1,310,720,000	\$2,621,440,000	\$5,242,880,000
20	1998	\$2,621,440,000	\$5,242,880,000	\$10,485,760,000
21	1999	\$5,242,880,000	\$10,485,760,000	\$20,971,520,000
22	2000	\$10,485,760,000	\$20,971,520,000	\$41,943,040,000
23	2001	\$20,971,520,000	\$41,943,040,000	\$83,886,080,000
24	2002	\$41,943,040,000	\$83,886,080,000	\$167,772,160,000
25	2003	\$83,886,080,000	\$167,772,160,000	\$335,544,320,000
26	2004	\$167,772,160,000	\$335,544,320,000	\$671,088,640,000
27	2005	\$335,544,320,000	\$671,088,640,000	\$1,342,177,280,000
28	2006	\$671,088,640,000	\$1,342,177,280,000	\$2,684,354,560,000
29	2007	\$1,342,177,280,000	\$2,684,354,560,000	\$5,368,709,120,000
30	2008	\$2,684,354,560,000	\$5,368,709,120,000	\$10,737,418,240,000
31	2009	\$5,368,709,120,000	\$10,737,418,240,000	\$21,474,836,480,000
32	2010	\$10,737,418,240,000	\$21,474,836,480,000	\$42,949,672,960,000

All fines due upon the end of adjudication, not after some grace period like 1-year

When someone commits a crime and gets caught, they pay a fine and/or go to jail. They don't get a grace period in which they can correct their misdeed and go away unscathed. Why should removal of illegal encroachments be any different? I used the income tax analogy in my comments last night. When someone is caught for not paying taxes they owe, even if it was an innocent error, they are assessed penalties (and then interest if they fail to pay promptly). Without fines, **there is no deterrence because there are no consequences (other than the cost of removal)**; but that deferred removal cost will be worth it to many because until they get caught (and one year after) they get the private use of parklands.

Liens applied 1-year after fines assessed in all cases (not as a "last resort")

One of you asked whether it is legal to apply liens, and the City Attorney said yes. But these liens should not be "a last resort" as proposed by staff. A lien needs to be applied in each instance, probably automatically at the end of the one-year period (or perhaps less for minor encroachments). While the City cannot block the sale of a property, you can make it difficult to get title insurance and a mortgage. And even if a buyer decided to pay cash and forego title insurance, they would inherit the rapidly escalating fine rendering their purchase prohibitively expensive. (BTW, I agree with the moratorium on permits when there is an open unresolved encroachment is also appropriate.)

No grace period but 1-year amnesty from the date the new policy is enacted

Staff concluded that "amnesty is redundant." That is true if everyone gets a one-year grace period to remove encroachments without paying a fine. But in my proposal it is **essential that the fine is assessed and due at the time of the citation (after being adjudicated through the City's normal Parklands Commission/Planning Commission/City Council vetting process)**. This motivates residents to be **self-enforcing**, in which they take the time to understand their boundaries, the rules, and live within those constraints. The amnesty period is important because it give the City time to educate the residents on the need for compliance and the severe consequences for not complying. **But once that initial amnesty period is over, there should be no exceptions – when someone breaks the law, the fine is triggered and owed AND they have to remove the encroachment.**

Legal actions to force compliance should be unnecessary

Some of your inquiries were about the cost of taking legal action. Legal action should not be necessary. The exponential escalation of fines will cause remediation and payment to occur – otherwise, the **owner won't be able to sell their property and their liability will eventually exceed the value of their property**. The City can be patient and wait. As long as the escalation in fines is only applied to parkland encroachments which are based on deed restrictions (and not judgment which can be questioned), the City has no latitude in making exceptions (other than for public access). **Should an owner sue the City, they will lose. The City has the deed restrictions on their side, and this was validated in court during the CEPC case.**

Severity factors affect the size of the initial fine

All encroachments are clearly not the same. But it is not as simple as **vegetation vs structures**. Also needing to be considered is the degree to which blockage that restricts public access needs to be

considered. For example, a dense and impassible hedge is more egregious than a paving stone or bird bath. An eight-foot-high wall is more egregious than a one-foot-high threshold wall. The fines should be expressed in a range, along with an explanation of the factors to be considered in determining the fine. *As the City Attorney pointed out, this cannot be arbitrary. But it also does not need to be specified in terms a specific list of fines for walls, pools gazeboes, etc..* **The highest fines should be reserved for egregious encroachments on parkland, and those are pretty obvious.**

Several other thoughts.

First, Public Education is critical. The City should use multiple means of educating the residents on this new policy and the importance of understanding property boundaries and whether they are in compliance so that they can take action during the amnesty period without intervention by the City. These means can include such initiatives as:

- City Website
- Pushout emails to those that subscribe to notices on the City website
- City Newsletter
- Articles in the Daily Breeze and Peninsula News
- Brochure that real estate brokers MUST hand out to buyers before they close on sales
- Town Halls to explain the new rules
- Reminders in City Council, Planning Commission and Parklands Committee meetings several times (for each governing body) in the first “amnesty” year
- Etc.

Second, City Right Of Way Vacation. This needs to be modified to apply only to the ROW along the street in front of houses. It should never be applied to ROW that includes the ninety or so Paths, Lanes and Alleys throughout our City that run between houses. Typically, these are 20 feet wide and there should be no allowance for blockage even though they are not deed restricted parkland. They are part of the original Olmsted design of PVE which has no sidewalks; these provide passage between streets that can be important for public hiking/recreation as well as essential during such events as major earthquakes where the roads may become impassible. There have been instances in the past where the City vacated a Path and gave the land (without any compensation) to the adjacent owners. **This is what I am strongly opposed to since those paths are public property and it is totally inappropriate to grant that to adjacent owners without compensation to the City.** Since these paths are not Deed Restricted Parkland, there is no prohibition on the sale of these ROW Paths, but it should not be a free give-away for the benefit of adjacent residents at the expense of all other residents. ROW along the street is a different matter, and I think if that is what the staff intended when they indicated that it was a possible tool for resolving enforcement. But the language of the document does not distinguish between these different types of ROW, and it should.

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I hope this brings clarity to my proposal, and that you now better appreciate how all these elements can work together to create an effective policy that cleans up the encroachments that exist today, and stops new ones from being built (or planted) by providing an effective deterrence.

If any of you would like to discuss any of this before the next time this appears in City Council for review, please let me know. I stand ready to help. An effective Enforcement Encroachment Policy is very

important to preserving the character of our City and ensuring the vision of our City Founders and the Olmsted Brothers. An essential element of that vision was to create a desirable community defined by a quarter of it interlaced with open space that is **protected as parkland forever**.

Thank you for your time and consideration,

Sincerely,
John